

No. 75-1776

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

JOHN HENRY LONG, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 533 F. 2d 505.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1976. A petition for rehearing was denied on May 17, 1976. The petition for a writ of certiorari was filed on June 7, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court violated petitioner's Sixth Amendment right to compulsory process by quashing a defense subpoena for the testimony of a known government informant, where further disclosure of the informant's identity through trial testimony

would have prejudiced other aspects of an ongoing investigation and endangered the informant's life and where the informant's testimony would have been either cumulative or adverse to petitioner.

STATEMENT

After a jury trial in the United States District Court for the Western District of Washington, petitioner was convicted of two counts of distributing cocaine in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of two years' imprisonment to be followed by three years' special parole. The court of appeals affirmed (Pet. App. B).

On February 4, 1974, federal narcotics agent Charles Mathis, accompanied by Rick Lyles, a government informant, met with petitioner at the latter's residence for the purpose of purchasing narcotics (Tr. 75-76). Mathis negotiated with petitioner to purchase "unlimited amounts of cocaine and heroin" (*id.* at 76). Two days later, Mathis and Lyles returned to petitioner's residence and Mathis purchased a sample of cocaine (Tr. 78-79). That night, Mathis purchased two more ounces of cocaine from petitioner (Tr. 81).

Petitioner testified that he sold to Mathis what he believed to be baking soda or sugar at the direction of Lyles, who provided petitioner with the substances. He denied knowing that the substances he sold were cocaine (Tr. 145-152).

Prior to trial, the defense moved for disclosure of the identity of the government informant. The government provided the defense with the name of Rick Lyles. Defense counsel served Lyles with a subpoena, pursuant to Rule 17(b), Fed. R. Crim. P., while Lyles was at the United States Attorney's office. The government moved to quash the subpoena on the grounds that

the informant feared for his life, that he was then involved in other investigations that might be compromised if he testified, and that he did not have information that would be beneficial to petitioner (Pet. App. A4-A5).

Petitioner's counsel informed the district court, during *in camera* proceedings, that petitioner would testify that the informant had induced him to enter into a scheme to defraud a buyer (who turned out to be the government agent) by selling him a white powder furnished by the informant, which petitioner believed, on the informant's representations, to be baking soda and sugar (Tr. 15).

After the defense was given an opportunity to interview the informant, and based in part on questions submitted by petitioner's counsel, the district court conducted an *in camera* interrogation of the informant outside the presence of government and defense counsel. Following this interrogation, the court concluded that the informant's "testimony would be cumulative [and] not harmful to the government" (Tr. 68). The court accordingly quashed the subpoena.

ARGUMENT

Petitioner contends that he was entitled to the informant's testimony and that the "informer's privilege" was waived by the government when it disclosed the informant's identity. The contention was thoroughly considered and correctly rejected by the court of appeals, on whose opinion we principally rely.

In *Roviaro v. United States*, 353 U.S. 53, 59, this Court recognized "the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." Since "the purpose of

the privilege is to maintain the Government's channels of communication by shielding the identity of an informer from those who would have cause to resent his conduct" (*id.* at 60, n. 8), the privilege is inapplicable "once the identity of the informer has been disclosed to those who would have cause to resent the communication" (*id.* at 60). The privilege may also give way if, in a particular case, "fundamental requirements of fairness" dictate disclosure (*ibid.*). The Court stated (*id.* at 62):

The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

Petitioner's argument is simply that the *Roviaro* privilege was waived when the government disclosed to him the informant's identity. As the court of appeals stated, however, this case presents the unusual situation in which "[p]ersons other than the particular defendant may have cause to resent the informant's conduct, and disclosure to the defendant alone may not be equivalent to disclosure to these other persons" (Pet. App. A6). The court explained the situation as follows (*ibid.*):

The informant had been involved in eight or ten transactions involving a distinct clique of participants in the drug traffic in the Seattle area. Those in the clique he had exposed were aware of his role, but members of the much larger group were not. The informer feared that if he appeared at trial as a government witness his role as an informer

would be established with the latter group as well. On this record the trial court could conclude that the informer privilege continued to serve its intended purpose despite the transmittal of the informant's name to [petitioner's] counsel.

The privilege was invoked here by the government (and sustained by the courts below) not to prevent disclosing the informant's identity to petitioner. The government freely made that disclosure. The privilege was invoked to avoid disclosure to other participants in ongoing Seattle drug transactions with respect to which the informant was continuing to furnish critical information. In the special circumstances of this case, the considerations that give rise to the "informer's privilege" (*Roviaro v. United States*, *supra*, 353 U.S. at 50) were fully applicable notwithstanding the limited disclosure already made to petitioner.¹

The remaining question under *Roviaro* is whether "fundamental requirements of fairness" (353 U.S. at 60) nevertheless outweighed the privilege so that petitioner should have been allowed to call the informant as a witness notwithstanding the consequences of additional disclosure. That essentially factual inquiry was made by both courts below, and both correctly concluded that the balance dictated against further disclosure. As the court of appeals stated (Pet. App. A6-A7):

On the basis of the whole record, including the transcript of the *in camera* proceedings, we are unable to say the trial court erred in striking the

¹*United States v. Godkins*, 527 F. 2d 1321 (C.A. 5), on which petitioner relies, is not to the contrary. There was no showing in that case, as there was here, that the informant's appearance at trial as a witness would jeopardize an ongoing criminal investigation and expose the informant to a significant additional risk of harm.

Roviaro balance. It is true that the informant participated in the transaction, and his testimony would have been critical if it had corroborated that of [petitioner]. On the other hand, the informant was not the only witness to the actual sales, and the testimony of the government agent to whom both sales were made was essentially the same as the informer's *in camera* testimony. To the extent that it was not cumulative, the informer's testimony was adverse to [petitioner] in every respect. The informer had been productive in a large number of investigations. His exposure would not only end that cooperation, but, in all probability, would discourage communications from others as well. The risk from further disclosure was real; there were reports from independent sources that two "contracts" for the informant's execution were already in existence.

Finally, the court of appeals correctly held—and petitioner does not expressly challenge the holding—that on the present record any error in quashing petitioner's subpoena was harmless beyond a reasonable doubt (Pet. App. A7):

Even if the informer's privilege had ended with the disclosure of the informant's name to [petitioner's] counsel, we would reject [petitioner's] challenge to his conviction on the ground that if [petitioner] was erroneously prevented from using the informant as a witness, the error was harmless beyond a reasonable doubt. Error resulting in the unavailability of a witness is subject to the harmless error rule (*United States v. Perlman*, 430 F. 2d 22, 26 (7th Cir. 1970); *United States v. Watson*, 421 F. 2d 1357, 1358 (9th Cir. 1970); *Greenwell v. United States*, 317 F. 2d 108, 111 (D.C. Cir. 1963)); and, as we have said, the *in camera* transcript demonstrates that the testimony of the informer would

have been consistent with that of the government agents, largely cumulative, and adverse to [petitioner] to the extent it was not cumulative.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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